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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

~~71-~~ 346

Docket No.....

DAVID M. CRAWFORD,

Petitioner,

v.

SECURITIES EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Warren E. Burger, Chief
Justice, and the Honorable Associate
Justices of the Supreme Court of the
United States:

Your petitioner, David M. Crawford, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 9, 1968 (App. A 172-3a)* and on June 10, 1971 (App. A 234a). This is a companion petition to petitions filed on behalf of other defendants in an action brought by the Securities and Exchange Commission ("SEC") against the Texas Gulf Sulphur Company ("Texas Gulf") et al.

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Southern District of New York (Bonsal, J) on the law was entered August 16, 1966 (258 F. Supp. 262) (App. A-1-65a). The appeal from the District Court's order of August 16, 1966 was argued before a three-judge panel March 20, 1967 and on May 2, 1968, prior to any decision the case was ordered en banc (Add. infra, 1).

The opinion of the United States Court of Appeals for the Second Circuit was filed

*Unless otherwise indicated references in this petition are: Judgments and opinions below, Appendix A to White & Case Petition "(App. A)"; Constitutional Amendments Statutes and Rules: Appendix B to White & Case Petition "(App. B) and Addendum to this petition (Add. infra,) Joint Appendix Before The Court of Appeals (JA). Exhibits to Joint Appendix before the Court of Appeals. (e).

August 13, 1968 (401 F. 2d. 833) (App. A 66-171a). The opinion of the United States District Court for the Southern District of New York on the remedies was filed February 6, 1970 (312 F. Supp. 77) (App. A 175-214a). The opinion of the United States Court of Appeals for the Second Circuit was filed on June 10, 1971 (App. A 220a).

JURISDICTION

The Court of Appeals entered judgment on December 9, 1968 (App. A 172-3a) and on June 10, 1971 (App. A 234a) and this petition for certiorari was filed within ninety days of the latter date. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does a decision rendered by an en banc Court of Appeals on an original hearing contravene 28 U.S.C. 46(c) and (d) and the Due Process Clause of the Fifth Amendment when oral argument is permitted before only three of the nine judges, two less than the statutory quorum?

2. Does an officer's purchase of stock on a national securities exchange on information which he believes to be available to the public, constitute fraud or deceit under §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5?

3. Is an officer guilty of fraud or deceit for failing to comply with a standard of conduct proposed for the first time in the complaint herein?

4. Does Rule 10(b)-5, as construed by the Securities and Exchange Commission and the Court below, provide the ascertainable standard of conduct required by the Fifth Amendment to the United States Constitution?

5. Are the equal protection and due process provisions of the Fifth Amendment violated by enjoining petitioner for life, pursuant to §10(b) and Rule 10(b)-5 when the conduct enjoined is not stated in the section or the rule and the Congress has specifically rejected enacting legislation prohibiting the conduct enjoined?

6. Can Section 10(b) and Rule 10(b)-5 be violated by conduct which is neither manipulative or deceptive?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND COURT ORDERS INVOLVED

Constitution of the United States Amendment V (App. B 235a).

Court of Appeals for the Second Circuit, Order of May 2, 1968 (Add. infra, 1).

28 U.S.C. 46 (c) and (d) (Add. infra, 1).

15 U.S.C. 78j (b) (App B 235-6a).

17 C.F.R. 240 10(b)-5 (App. B 238a).

Federal Rules of Appellate Procedure 35(a) and 40(a) (Add. infra 2).

Securities and Exchange Commission Rule 2(e) (Add. infra 3).

STATEMENT OF THE CASE

1. Prior Proceedings

The SEC filed its complaint April 19, 1965 demanding rescission or restitution and an injunction; the answer denied liability and asserted various defenses. In his first opinion (App. A 1-63a) the District Judge held that the stock exchange purchase by petitioner of his company's stock, violated §10b of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b) (App. B 235-6a) and Rule 10b-5 promulgated thereunder (App. B 238a).

The original hearing on appeal from the District Judge's order was argued March 20, 1967 before a three-judge panel. More than a year later, on May 2, 1968, no decision having been rendered by the panel, upon motion of the active circuit judges, the appeal was ordered en banc without further argument so that only three of the nine judges heard argument on the original hearing. (Add. infra, 1).

On August 13, 1968 the Court of Appeals affirmed the finding that appellant had violated 15 U.S.C. 78j (b) and Rule 10b-5 and remanded the action to the District Court to determine the remedy to be applied against petitioner (App. A 172-3a), the question of relief, if any, having been reserved for a separate hearing.

Petitioner and other defendents filed a petition for rehearing September 20, 1968 which noted that only three of the nine judges had heard oral argument. The petition was denied without opinion October 15, 1968 (Add. infra, 4).

Hearings were held before the District Judge October 6, 7, and 8, 1969. No evidence was introduced by the SEC during the hearing that petitioner was engaged or about to engage in any conduct that violated or was likely to violate §10(b) and Rule 10(b)-5.

On February 6, 1970, the District Judge rendered his decision and opinion that petitioner should be enjoined and on April 16, 1970, entered judgment permanently enjoining petitioner "from engaging in the purchase or sale of Texas Gulf Sulphur Company securities on the basis of undisclosed material information relating to Texas Gulf Sulphur Company acquired by (petitioner) by reason of any relationship with Texas Gulf Sulphur Company or its agents or employees" (App.A 216a).

The appeal from the District Judge's order was heard by a three-judge panel May 11, 1971. On June 10, 1971 the Court of Appeals affirmed the District Court's decision and judgment (App. A 220a).

On July 7, 1971 the Court of Appeals ordered a stay of its mandate until July 31, 1971 and on August 3, 1971 ordered a stay of its mandate until September 8, 1971.

2. The Facts and Decisions Below

Petitioner was employed by Texas Gulf Sulphur Company in January 1964 and became Corporate Secretary and Manager of Public and Government Relations on February 20, 1964.

On April 15-16, 1964, petitioner believing that the news of Texas Gulf's discovery had already been announced on the Company's behalf on television and radio by Mr. Wardrope, the Ontario Minister of Mines, ordered 600 shares of his Company's stock. (Add. infra, 5-7). As petitioner believed it would be his order was executed more than 10 hours after the announcement on which petitioner relied was to have been made. (App. A 101a).

The Minister of Mines announcement was written for him by the Texas Gulf Vice President for Exploration on the morning of April 15 and was scheduled for release on television and radio at 11 p.m., April 15, 1964. (Add. infra, 5-7).

Petitioner believed that following the Minister of Mines announcement, it would be proper to place an order for his Company's stock particularly since the order could not be acted upon for at least ten hours while news of the discovery would be circulating in the public domain. Unbeknownst to anyone in the Company at the time, the Minister of Mines released the announcement to the press gallery of the Ontario Legislature in Toronto at 9:40 a.m., April 16.

Petitioner's purchase was not executed until after the company authorized announcement had been released; as Judge Waterman said:

> "...all of which transpired prior to the anticipated execution of his purchase order..." (App. A 101a).

On the remand the SEC introduced no evidence as to what remedy if any was appropriate as to petitioner. Petitioner testified without contradiction that in a conversation with Mr. Burger of the New York Stock Exchange, Department of Stock List, on April 16, 1964, the same day the stock was purchased:

> "Mr. Burger called me on the afternoon of April 16, and the message was on my desk and when I called him back he asked me--he referred to the trading in Texas Gulf Company shares that day and asked if any of the officers or directors had purchased shares. And I said that I did not know about any of the others but that I had, and if I had inadvertently, unwittingly done anything wrong, that I would be glad to do whatever was necessary to rectify it." (316 JA).

Prior to joining Texas Gulf, petitioner had graduated from Cornell University with an AB in 1938 and from the Yale Law School with an LLB in 1941 where he was Director of the Yale Moot Court. Petitioner was admitted to the New York Bar in 1941 and the Illinois Bar in 1963.

While in his last year at law school petitioner joined the Navy and served in

the Cruiser Vincennes in the winter of 1940. Following graduation in June 1941 he went on active duty serving in Naval Intelligence, at sea in the Atlantic, and in the Battle for Leyte Gulf; petitioner's last command was a Navy tanker in the Pacific.

From 1946 to 1948 petitioner was associated with Lord, Day & Lord and taught an Admirality Seminar at the Yale Law School. In 1948 petitioner joined the General Counsel's office of the Marshall Plan serving in Washington, Athens and Paris. He is the author of "United States Foreign Assistance Legislation 1947-1948" 58 YLJ 871 (1949) and "Negotiated Settlements : Anglo-Iranian Oil Company and Suez Canal Cases." p. 427 in "The Rights and Duties of Private Investors Abroad" Matthew Bender & Co. (1965).

In 1951 petitioner joined the General Counsel's office of Socony Vacuum Oil Company and in 1958 became Manger of their Office of Intergovernmental Affairs. In 1961 petitioner became Secretary and General Counsel of Abbott Laboratories and in 1964 became Secretary and Manager of Public and Government Relations for Texas Gulf.

REASONS FOR GRANTING THE WRIT

In view of this Court's continued concern with the role of en banc courts in appellate procedure, as expressed by Chief Justice Burger in his annual report to the American Bar Association July 5, 1971, the procedural aspects of this landmark case ought to be reviewed by this court to construe 28 U.S.C. 46(c) and (d) and en banc procedure in the original hearing of appeals in the Circuit Courts. As this Court's workload increases Courts of Appeals will more often be the courts of last resort, and it is important to all litigants that the procedure in each circuit on an original hearing en banc be clear and uniformly administered.

The substantive law of this case is equally worthy of this Court's review as it will have an important bearing on thousands of security transactions. The Second Circuit viewed the case as one of exceptional importance for it sua sponte ordered the case en banc after a three-judge panel had the case for more than a year without rendering a decision. When, after seventeen months deliberation Judge Waterman released the Second Circuit's decision and opinions to the Wall Street Journal, he emphasized the importance of the case, being quoted as saying:

> "It's going to have a hell of an impact on the financial world. Everyone in the U.S. has been waiting for this." Wall Street Journal, August 14, 1968.

A. Summary of Procedural Reasons for Review:

1. The Second Circuit's construction of 28 U.S.C. 46(c) and (d) is contrary to the holding of this court in U.S. v. American Foreign S.S. Corp. 363 U.S. 685 (1960) and the plain language of the statute and violated the due process clause of the Fifth Amendment.

2. The Second Circuit's construction of §46(c) and (d) is contrary to the construction and practice of the Courts of Appeals for the Third and Fifth Circuits when conducting original hearings en banc thus presenting a conflict between circuits which this court can most effectively resolve.

3. The Second Circuit has so far departed from the accepted and usual course of judicial proceedings in its application of 28 U.S.C. §46(c) and (d) as to call for this court's review.

B. Summary of Substantive Reasons for Review:

1. The construction given 15 U.S.C. 78j and 17 C.F.R. 240 10(b)-5 by the Second Circuit is contrary to the statute and rule and violates petitioner's rights under the Fifth Amendment.

2. The construction given 15 U.S.C. 78j and 17 C.F.R. 240 10(b)-5 by the Second Circuit is not only erroneous but also affects thousands of security transactions potentially creating a large volume of unnecessary litigation in the Federal courts.

A R G U M E N T

I

THE SECOND CIRCUIT ERRED IN DENYING PETITIONER ORAL ARGUMENT BEFORE A STATUTORY QUORUM OF THE EN BANC COURT IN AN ORIGINAL HEARING.

Section 46(c) reads in part:

> "Cases and controversies shall be heard...by a court...of not more than three judges unless a hearing...before the court in banc is ordered." (Add. infra, 1).

Section 46(d) reads:

> "A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

Petitioner's appeal was heard by a three-judge panel of the Second Circuit on March 20, 1967 and on May 2, 1968, no decision having been rendered, the case was ordered en banc "without further argument" (Add. infra, 1). The judgment of the Second Circuit, dated August 13, 1968 (App. 172-3a) entered December 9, 1968, names as present all nine active judges to whom the case was ordered en banc and states:

> "This cause came on to be heard... and was argued by counsel" (App. 172-3a).

The recital of nine judges as "present" does not reflect the latent defect that only three of those nine judges, two less than

the statutory quorum, heard argument by counsel. Petitioner submits that the Second Circuit committed fundamental error and that the judgment is void and of no effect since the argument was not heard by a statutory quorum of the court as required by the controlling statute Section 46(c) and (d).

The Second Circuit leaves litigants in a quandary with respect to its en banc procedure admitting that it has:

> "...no set rule in this regard, but are guided by what we conclude are the needs of a particular case." U.S. v. Gori, 282 F. 2d 43 at 53 (1960), affirmed on other grounds, 367 U.S. 364 (1961).

The Second Circuit's admitted lack of an applicable en banc rule ought not entitle that court to disregard the requirements of a statutory quorum.

The Pennsylvania Law Review has commented that en banc practice such as that followed by the Second Circuit in petitioner's case:

> "...has been criticized however, primarily because it permits judges to whom the litigants were unable to argue their views to exert considerable influence on the disposition of a case." En banc Procedure in the Federal Courts of Appeals 111 U.Pa.L.R. 220-230 (1962).

The Second Circuit's inconsistent en banc procedure was the subject of one of Judge Clark's last opinions in Walters v. Moore McCormack Lines, Inc., 312 F. 2d. 893 (1963). Drawing on his long experience in judicial procedure as Judge and Chief Judge of the Second Circuit, Judge Clark wrote in dissenting from the Second Circuit's en banc procedure in Walters, in which Mr. Justice Marshall also dissented:

> "In view of the anomalies of our in banc procedure,illustrated in an increasing number of cases of which this is a crowning example, it seems desirable,if not necessary, to point out where we seem to have arrived or to be tending." Id. at 896.

Petitioner's case illustrates the continuing anomalies in en banc procedure in the Second Circuit; in petitioner's case "heard" was given two different meanings in the same hearing. When petitioner's case was before the three-judge panel on the original hearing "heard" meant oral argument; when petitioner's appeal was before nine judges on the original hearing "heard" meant no oral argument (Add. infra, 1). Reasons for oral argument before three judges were equally applicable to the other six en banc judges.

During its October 1959 term this Court issued a writ of certiorari to the Court of Appeals for the Second Circuit, after Chief Judge Clark and Judge Waterman had suggested in their dissenting opinion in American Foreign S.S. Corp. v. U.S. 265 F. 2d. 136 (1959) that a literal interpretation be given to the words "active" and

"determined"in Section 46(c). Mr. Justice Stewart observed in the Court's opinion upholding the literal interpretation of Section 46(c) advocated by Chief Judge Clark and Judge Waterman:

> "Certiorari was granted to consider a question of importance to the Courts of Appeals in the administration of their judicial business." U.S. v. American Foreign S.S. Corp., 363 U.S. 685 at 687 (1960).

This Court ought now review Judge Waterman's contrary interpretation of the same section of the Judicial Code on an important question affecting all Circuit Courts of Appeals in the administration of their judicial business.

Petitioner submits that pursuant to 28 U.S.C. 46(c) and (d):

> (1) "Heard" implies oral argument on an original hearing en banc, and
>
> (2) Oral argument on an original hearing en banc ought to be heard by a statutory quorum of the Court.

1. "Heard" implies oral argument on an original hearing en banc.

On May 2, 1968 when the Second Circuit ordered this case en banc it referred to the "judges who heard oral argument" thus implying that "heard" meant "oral argument." (Add. infra, 1).

Speaking for a unanimous Supreme Court, Chief Justice Hughes succinctly stated "The one who decides must hear." Morgan v. U.S. 298 U.S. 468, 481 (1936).

This Court in construing the phrases "heard and determined" and the "active circuit judges" in Section 46 has held that "The literal meaning of the words seems plain enough." U.S. v. American Foreign at 688. After analyzing the words "active" and "determined" Mr. Justice Stewart speaking for the court concluded:

> "There is nothing in the history of the legislation to indicate that these words should be understood to mean anything else than what they say." Id 688-689.

The same literal meaning should be accorded "heard" in the same section, and derogation of oral argument before a statutory quorum of the en banc court ought not be innovated by the Second Circuit. This Court laid down for the Second Circuit a literal interpretation of the terms "active" and "determined" in Section 46(c) in a case involving only statutory construction and that circuit court ought to have been as literal in its interpretation of the word "heard" in the same paragraph.

This Court ought now review the Second Circuit's failure to follow the Court's previous directive to it in U.S. v. American Foreign S.S. Corp., supra, for Mr. Justice Stewart then said of Section 46:

> "if the statute is to be changed, it is for Congress, not for us, to change it." U.S. v. American Foreign S.S. Corp. at 691.

Mr. Justice Harlan's dissent in American Foreign S. S. Corp., in which he was joined by Mr. Justice Frankfurter and Mr. Justice Brennan, also indicates that this court ought to review the Second Circuit's procedure for handling original hearings en banc. Mr. Justice Harlan construing the traditional term "heard and determined" in §46 in American Foreign S. S. Corp. stated:

> "It is not an unknown phenomenon in federal adjudication that a case, though heard by less than the entire tribunal, may be decided according to the majority vote of all. * * * The traditional term, "heard and determined" in my view was designed to do no more than reflect the obvious inappropriateness of such a procedure to the deliberations of the Court of Appeals." Id. 692.

The importance of oral argument on original hearings in the Second Circuit was recently emphasized by Chief Judge Lumbard in an address to the New York County Lawyers Association March 3, 1971 when he was reported by The New York Law Journal of March 4, 1971 as saying:

> "No matter how frivolous the arguments may be . . . he felt they should be heard."

The first sentence of Rule 34(a) of the Federal Rules of Appellate Procedure states:

> "The Clerk shall advise all parties of the time and place at which oral argument will be heard."

The special importance of oral argument to an appellant is emphasized by paragraph (e) of Rule 34:

> "If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present."

The importance this court attaches to oral argument is emphasized by its Rule 45 (1) which states in part: "The Court looks with disfavor on the submission of cases on briefs, without oral argument...," and Mr. Justice Brennan has observed:

> "...every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments." Eaton v. Price 360 U.S. 246, 247 (1959).

Federal Rule of Appellate Procedure 35a (Add. infra, 2) provides that en banc courts may be convened in cases involving questions of exceptional importance, and this Court has stated:

> "En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." U.S. v. American Foreign S.S. Corp., 363 U.S. at 689.

Chief Justice Vinson stated that §46(c) is a codification of Textile Mills v. Com. 314 U.S. 326 (1943) which was this Court's

approval of the en banc procedure structured by the Court of Appeals for the Third Circuit. Western Pacific R. R. Corp. v. Western Pacific R. R. Co. 345 U.S. 247 at 256 (1953).

When Mr. Justice Douglas in Textile Mills approved for a unanimous court the en banc procedure on original hearings evolved by the Third Circuit, he referred to:

> "...the most important function of the 'court' (the hearing and the decision of appeals).." Id. 333.

In the Third Circuit parties were allowed oral argument on original hearings en banc before a majority of the court. When Textile Mills was before the Third Circuit Judge Biggs stated with respect to the en banc procedure in that case:

> "This case was originally heard by three circuit judges but before its decision this court, by special order, directed that it be reheard by the Court en banc, consisting of the five circuit judges of the circuit in active service. The case has now been heard and considered by the Court En Banc." Com. v. Textile Mills S. Corp. 117 F. 2d 62 at 67 (1940).

Thus the en banc procedure on original hearings codified as Sec. 46 included oral argument before a majority of judges i.e., a statutory quorum. The legislative history of §46 reveals no Congressional intention of eliminating the right to oral argument before en banc courts on original hearings.

In U. S. v. American Foreign S.S., supra, Mr. Justice Stewart cited Judge Maris of the Court of Appeals for the Third Circuit as an authority on en banc procedure. Id. 690. Judge Maris, one of the three judges of the Judicial Conference Committee on the revision of the Judicial Code which became the 1948 Judicial Code, indicates in his monograph on en banc procedure entitled "Hearing and Rehearing Cases en Banc," that in an original hearing en banc, oral argument is heard. 14 F.R.D. 91 (1954). Summarizing the Third Circuit's procedure, Judge Maris writes:

> "If following the circulation of a draft opinion, four circuit judges request that the case be reargued en banc the hearing panel enters an order setting the case down for reargument en banc." Id. 93.

Since July 1, 1968, after petitioner's case was ordered en banc, the Court of Appeals for the Fifth Circuit pursuant to its Rule 18 has established a screening procedure for denying oral argument in certain appeals before a three-judge panel. However, if a single judge of the panel feels oral argument should be heard it is heard. Moreover, the Fifth Circuit allows oral argument on an original hearing when a case is of such importance that it is referred en banc prior to a decision by the three-judge panel. Allen v. Johnson 391 F. 2d. 527 (Fifth Cir. 1968) 413 F. 2d. 1218 (1969).

In petitioner's case the Second Circuit relied on Western Pacific supra, and Shenker v. B. & O., 374 U.S. 1 (1963) observing that §46(c) was addressed to the Court and not to litigants (App. A 232a). Petitioner submits

that the holding of Western Pacific and Shenker is limited to the principle that the determination as to whether an appeal will be ordered to be heard or reheard en banc is an intramural decision to be made by the Court. Petitioner suggests that no matter to whom §46(c) and (d) are addressed they require that oral argument on the original hearing "shall be heard" by a statutory quorum of the en banc court, and that it does not follow that the en banc court has the right to disregard the plain language of the statute to "hear" the appeal simply because it has the power to determine whether or not it will sit en banc.

If, as the Second Circuit has held, "heard" does not imply "oral argument" on an original hearing en banc because §46(c) is addressed to the courts and not to litigants, the Circuit Courts can interpret §46(c) any way they choose. Lest such power in any way flaw Circuit Court procedure, this court ought to review the questions presented.

Although FRAP 40 (a) (Add. infra, 2) specifically provides that oral argument in support of a petition for rehearing is not permitted and that the court on a rehearing may make final disposition of a case without "reargument," the fact that the rule uses the term "reargument" implies that there has been argument at the hearing stage. Petitioner's case was not a rehearing. The only petition for rehearing in this case was filed September 20, 1968, raising, inter alia,

the en banc question raised herein, and was denied without opinion October 15, 1968. The seventeen month appeal before the Second Circuit in this case was therefore still a proceeding in the original hearing stage.

In its opinion below the Second Circuit erroneously referred to the en banc court as a "rehearing" (App. A 233a). As of May 2, 1968 when the case was ordered en banc no opinion had been filed, no decision had been rendered, and no judgment had been entered so the appeal was still at the hearing stage.

In view of the conflict between Circuit Courts and in the interest of sound and uniform judicial administration this court ought to review and establish what rules are applicable when a case is ordered en banc prior to a decision.

In its opinion below the Second Circuit observed:

> "...we do not intend that anything stated in the present opinion be construed as approving or disapproving the denial of oral arguments at the initial 'hearing' on appeal..." (App. A 233 a n 10).

Petitioner's case was still at the initial hearing stage when it was referred en banc, and for the same court to deny oral argument before a statutory quorum of the en banc court in a case of exceptional importance is anomalous and fosters a confused appellate procedure.

2. Oral Argument on an Original Hearing En Banc ought to be Heard by a Statutory Quorum of the Court.

This Court was unanimous in holding that:

> "...a certificate of questions or propositions of law concerning which a Circuit Court of Appeals desires the instruction of this Court for their proper decision is irregular when a quorum of its members does not sit in the case..." Cincinnati Ry v. McKeen. 149 U.S. 259, 260-261 (1893).

The Court of Appeals for the Fifth Circuit has held that the word "Quorum" in Section 46 (d) means:

> "...such a number of the members of the court as may legally transact judicial business." Tobin v. Ramey 206 F. 2d 505, 507 (5th Cir. 1953).

Congress has established statutory quorums for the courts since the first Judicial Code of 1789 provided that a quorum of the Supreme Court would be four of six justices. 1 Stat. 74-75. The Judicial Code of 1948 does not deny litigants oral argument before a statutory quorum of the Court on an original hearing en banc and the legislative history of the code reveals no such Congressional intent.

In construing the Judicial Code of 1948 Chief Justice Vinson wrote:

> "The short answer is that there is no need to refer to the legislative history where the statutory language is clear..It is obvious that the changes in law retained in the Code were not considered as "Controversial" by these Congressional Spokesmen." Exparte Collett 337 U.S. 55 at 61-62 (1949).

These spokesmen would undoubtedly have considered denying an appellant oral argument before a statutory quorum of an en banc court on an original hearing a controversial proposal which would have at least been mentioned during the hearings since it is not specifically referred to in the statute.

Assuming arguendo, that it might be acceptable procedure to deny all en banc judges oral argument on an original hearing the incongruous result reached in the present case is anomalous judicial administration. The three judges who heard oral argument had quite a different exposure to the case in seventeen months than the six judges who heard no argument and had only one-quarter of the time to consider the case. It is possible that in the present and companion cases, the three judges who heard oral argument might have rendered a substantially different decision from that reached by the nine judges of the en banc court, six of whom heard no oral argument.

Judge Jones'statutory and constitutional reasons for declining to participate in an en banc rehearing in which oral argument was denied are even more compelling when applied to a denial of an original hearing en banc. Reynolds Aluminum Company v. N.L.R.B. 394 F. 2d 405, 409 (5th Cir. 1968).

A comprehensive two part note on En Banc Hearings in the Federal Courts of Appeals comments:

> "Even if an en banc court could be properly constituted with only a quorum present, every eligible judge should sit." 40 N.Y.U.L.R. 739 (1965)

Uniform appellate procedure for original hearings of en banc cases ought to at least accord a statutory quorum of the active judges an opportunity to participate in the traditional phases of an appeal. The Second Circuit has created a hybrid "panel-en banc" procedure not contemplated by the statute.

It is anomalous for the Second Circuit to limit oral argument to a minority of the active judges on the original hearing en banc when the controlling statute, Section 46(c), requires a majority of the active judges to order the case en banc (Add. infra 1).

In view of the Second Circuit's rule 27(a) which accords litigants the right to orally argue motions seeking substantive relief, it is singularly inconsistent judicial administration for the same court to deny oral argument before a statutory quorum of the court in a case deemed important enough for en banc consideration.

Lest crowded calendars lead Circuit Courts to unwarranted emasculation of Section 46(c) and (d) in original hearings en banc, this Court ought to review the procedural questions presented.

II

THE EQUAL PROTECTION AND DUE PROCESS PROVISIONS OF THE FIFTH AMENDMENT WERE VIOLATED IN HOLDING THAT PETITIONER HAD VIOLATED SECTION 10(b) AND RULE 10(b)-5.

On its face Rule 10(b)-5 gives no indication that the purchase by a corporate employee of company stock following release of a company prepared and authorized announcement by a responsible government official of material information can be a violation of Rule 10(b)-5. (App B238a)

If Congress were to pass a law with criminal penalties making it unlawful for a corporate employee to trade in his company's stock for an indefinite time following disclosure of material information by his company this court would have sound reason and ample precedent for declaring such a law unconstitutional as a violation of the Fifth Amendment. McBoyle v. U.S. 283 U.S. 25 (1931)

The due process requirement of the Constitution requires clarity in a statute or regulation which carries criminal penalties, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

Even if criminal penalties are not sought in a particular case it is well established that the statute must nevertheless meet these standards. FCC v. American Broadcasting Co. 347 U.S. 284, (1954).

This court there said:

"It is true, as contended by the Commission that these are not criminal cases, but it is a criminal statute

> that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice." Id at 296

According to the District Judge Section 3 of Rule 10(b)-5 was the only section of Rule 10(b)-5 applicable to the facts of petitioner's case for he found:

> "There was no evidence, however, that the defendants employed 'any device, scheme or artifice to defraud' under section (1) or made any representations under section (2). Therefore, only section (3) is applicable to the facts of this case." (App A60a n 7)

It is impossible to know from the language of Section (3) that following release of a company prepared and authorized announcement by a responsible government official of material information that purchase by a corporate officer of stock in his company during an indefinite period of time would violate that section. (App B238a)

The District Judge found that petitioner did not violate the plain language of Section (3) of Rule 10(b)-5 for he specifically stated:

> "...there is no evidence that Crawford intended to deceive or to defraud anyone..." (App A40a)

Even assuming its constitutionality, how then did petitioner violate Rule 10(b)-5? In what respect was petitioner's conduct manipulative or deceptive?

The error of construing Rule 10(b)-5 to proscribe mere purchases by a company officer without any showing of fraud or deceit is emphasized by a review of the legislative history which discloses that Section 16b of the Securities Act was intended to fully cover at all times such purchases by insiders on National Exchanges.

Thomas Corcoran, one of the leading draftsman of the 1934 Act, testified before the House Committee on Interstate and Foreign Commerce:

> "Well, all we have said to the director, sir, is that he cannot sell your own stock short, or make a turn in his own stock within 6 months." Hearings on H.R. 7852 and H.R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 135 (1934).

Mr. Corcoran also indicated that Section 10(b) was:

> "...a catch-all clause to prevent manipulative devices. I do not think there is any objection to that kind of clause. The Commission should have the authority to deal with new manipulative devices." Id at 115

The placing of an order by petitioner to purchase his company stock when he believed the news of his company's discovery had been made public, was not a "new manipulative device."

Since Congress specifically limited Section 16 to requiring insiders to report their trades, not reverse their transactions within six months and forbade short sales, the Second Circuit has violated the principle enunciated by Mr. Justice Marshall in the New York Times - Washington Post cases that the Judicial Branch ought not aid and abet the Executive Branch in achieving a legal result specifically rejected by Congress.

Mr. Justice Marshall there stated:

> "It would however, be utterly inconsistent with the concept of separation of power for the Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit." New York Times Company, Petitioner v. United States. 39 U.S.L.W. 4879 June 30, 1971

Yet that is the result reached by the lower courts with respect to petitioner and it ought to be reviewed.

III

THE EQUAL PROTECTION AND DUE PROCESS PROVISIONS OF THE FIFTH AMENDMENT WERE VIOLATED BY ENJOINING PETITIONER PURSUANT TO SECTION 10(b) AND RULE 10(b)-5.

A key phrase in the permanent injunction imposed on petitioner is "undisclosed material information." (App A216a) Lower court interpretations of "material" and "disclosed" are so numerous, so vague and so subjective that it is inequitable and unconstitutional to place petitioner in perpetual jeopardy of contempt of court if he does not correctly anticipate a Court's hindsight interpretation of those words. In commenting on disclosure and related Section 10(b) and Rule 10(b)-5 problems, Williston on Contracts says:

> "...the Commission has not formulated any standards on timely and proper disclosure, nor has it adopted any rules with respect to permissible action by 'insiders' after disclosure; and the court decisions, as indicated below, have left the matter in utter confusion." 3rd. Edition Section 1533-B, p. 716.

In this case of first impression the District Judge and the presiding Circuit Judge have by their own admissions sentenced petitioner for life to comply with unascertainable standards.

The District Judge was not fully conversant with the law of disclosure for he ruled that after an announcement was handed to the press, insiders could trade in the shares of their company. (App A43a-44a).

The District Judge analyzed the flaws in any disclosure rule requiring an indefinite waiting period before insiders were free to trade and concluded:

> "This could only lead to uncertainty... No insider would know whether he had waited long enough after an announcement had been made...The Commission has not supplied, nor has the Court found, decisions specifying a waiting period after a corporate announcement is made... If a waiting period is to be fixed, this could be most appropriately done by the Commission..." (App. A 43a-44a).

Reversing the District Court the Second Circuit held that there should be a period after an announcement during which time insiders could not trade. However, the Second Circuit also recognized that this was an area in which the SEC had failed to carry out its rule-making function saying:

> "...the permissible timing of insider transactions after disclosures of various sorts is one of the many areas of expertise for appropriate exercise of the SEC's rule-making power, which we hope will be utilized in the future to provide some predictability of certainty for the business community" (App.A97 a n 18).

Petitioner is placed in perpetual jeopardy of being held in contempt of court where there are no perceptible guidelines. This is not only inequitable, it is unconstitutional.

This court should also review the injunction of petitioner for it denies him equal

protection of the law guaranteed by the Fifth Amendment in that he is barred from conveying his property for indefinite periods of time during which time others are free to convey identical property. Shapiro v. Thompson 394 U.S. 618 (1969).

IV

PETITIONER DID NOT VIOLATE SECTION 10(b) AND RULE 10(b)-5 SINCE HIS CONDUCT WAS NOT MANIPULATIVE OR DECEPTIVE.

Section 10(b) makes unlawful the use of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe ..." (App. B 236a).

There has been no evidence or contention that petitioner's purchase deceived or might have tended to deceive anyone or that such purchase manipulated or might have tended to manipulate anything. No seller of stock was caused to sell or otherwise affected by the purchase or other conduct of petitioner. Hence his conduct was not "deceptive" or "manipulative."

Petitioner asks this court to decide whether Section 10(b) and Rule 10(b)-5 can be violated by conduct which is not "manipulative" or "deceptive"? The majority below assert that, by the Exchange Act, "...Congress purposed to prevent inequitable and unfair practices and to insure fairness in securities transactions generally..." and

that Rule 10(b)-5 "...is based in policy on the justifiable expectation of the securities market place that all investors trading on impersonal exchanges have relatively equal access to material information ..." (App. A 85 a).

In effect, the court below holds that §10(b) proscribes not only the conduct the section refers to, i.e., that which is "deceptive" or "manipulative," but also certain conditions which may characterize a market place, e.g., those which a court may consider "unfair." Since petitioner's purchase did not harm or otherwise affect any seller, his conduct was not unfair to anyone.

V

IN PETITIONER'S CASE AN INEQUITABLE RESULT HAS BEEN REACHED IN THE NAME OF EQUITY.

1. Especially in a case of first impression, equitable remedies should be based on equal treatment. In not enjoining other defendants found to have violated Section 10(b) and Rule 10(b)-5 the District Judge assigned as reasons:

> "The record makes it clear that the discovery on the Kidd 55 segment was a once-in-a-lifetime affair."
>
> * * *
>
> "the violations occurred more than five years ago..."
>
> * * *
>
> "...there is no evidence that any of these defendants have been guilty of further violations."
>
> * * *

"It is believed that the wide publicity accorded to these defendants will serve as an adequate deterrent, when coupled with the fact that none of these defendants will retain the profits which they realized by reason of their violations."

* * *

"...the reporting requirements of the 1934 Act..."

* * *

"...but they, (i.e. other defendants) as indeed all insiders, are now on notice of the scope of Section 10(b) and Rule 10(b)-5." (App A196a)

Since all these reasons are equally applicable to petitioner, singling out petitioner for an injunction for life is most inequitable.

In setting aside a suspension order of only four months duration imposed by the SEC on a broker, the Court of Appeals for the Sixth Circuit assigned as reasons the passage of time since the violation had occurred, about the same time as in petitioner's case, and the fact that there had been no violation since the act complained of. Beck v. SEC 430 F. 2d 673 (6th Cir. 1970). The Court of Appeals concluded: "...the Commission's order is punitive, not remedial." Id at 674.

This is a case of first impression for at the time petitioner purchased his shares, no court had held that Section 10 (b) or Rule 10(b)-5 applied to a stock exchange transaction such as was involved here and petitioner testified without challenge that he knew of no law or regulation proscribing his action:

Q. "When you bought those shares, Mr. Crawford, did you know of any statute, rule of the SEC or the Stock Exchange or of any court which made it illegal or improper for you to make those purchases"?

A. "I did not." (316JA)

If petitioner had been trying to beat the news he could have purchased his company's stock the afternoon of April 15. The reasonableness and good faith of the petitioner's belief that an announcement by Mr. Wardrope, the Minister of Mines, prepared and authorized by the company (Add. infra, 5) would be in the public domain before his purchase could be acted upon is borne out by the District Court which specifically found with respect to the Minister of Mines announcement:

> "The effect of the foregoing was that before the market opened on April 16, some brokers and some speculators had picked up information that TGS had made an ore discovery." (App. A 36a)

2. The injunction imposed upon the petitioner is a punishment not a deterrent.

This Court has said:

> "The historic injunctive process was designed to deter not to punish." Hecht Co. v. Bowles 321 U.S. 321, 329 (1944).

Throughout these proceedings the SEC has emphasized their equitable nature in order to lighten its burden of proof in seeking the "mild prophylactic" of an injunction: However from the outset SEC counsel cast the petitioner and other defendants in the role of miscreants deserving punishment:

> "The Commission's objective in bringing these proceedings before the court are to drag to light and pillory the misconduct of the individual defendants." (283JA)

SEC's Rule 2(e) provides that petitioner by virtue of having violated the statute or having been enjoined by name in this proceeding can be suspended from appearing or practicing before it. (Add infra, 3). This is not a deterrent, it is a punishment.

For a respected member of the legal profession for thirty years to be found to have violated a Federal Statute is stigma enough for one lifetime. But to add to that an injunction for life is doubly degrading since the only inference is that unless an injunction is imposed the petitioner is likely to violate the rule again.

In its attempt to make new law respondent would destroy traditional law and petitioner too.

Such a case merits this court's review.

VI

ADOPTION OF ARGUMENTS CONTAINED IN COMPANION PETITIONS FILED IN THIS CASE.

Petitioner has read the petitions to be filed with this Court by White & Case; Keane, Butler & Grean, and Earl L. Huntington and respectfully adopts by reference the questions presented in those petitions and their reasons and arguments for soliciting this Court's review.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari ought to be granted.

Respectfully submitted,

David M. Crawford
Pro se

September 8, 1971

ADDENDUM 1

Court of Appeals for the Second Circuit Order of May 2, 1968

"Upon motion of the active circuit judges, it is ordered that the appeal be considered in banc by all the active judges of the court upon the record and the briefs heretofore filed, and the opinions written by the judges who heard the argument of the appeal, without further argument."

28 USCA §46 - Assignment of judges; divisions; hearings; quorum

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

ADDENDUM 2

Federal Rules of Appellate Procedure
Rule 35(a) and Rule 40(a)

Determination of Causes by the Court In Banc

35(a) When Hearing or Rehearing In Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Petition for Rehearing

40(a) Time for Filing; Content; Answers; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the Court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

ADDENDUM 3

SEC Rule 2e

(3)(i)The Commission, with due regard to the public interest and without preliminary hearing, may by order temporarily suspend from appearing or practicing before it any attorney, accountant, engineer or other professional or expert who, on or after July 1, 1971, has been by name

(A) permanently enjoined by any court of competent jurisdiction by reason of his misconduct in an action brought by the Commission from violation or aiding and abetting the violation of any provision of the federal securities laws (15 U.S.C. §§77a-80b-20) or of the rules and regulations thereunder; or

(B) found by any court of competent jurisdiction in an action brought by the Commission to which he is a party or found by this Commission in any administrative proceeding to which he is a party to have violated or aided and abetted the violation of any provision of the federal securities laws (15 U.S.C. §§77a-80b-20) or of the rules and regulations thereunder (unless the violation was found not to have been willful).

ADDENDUM 4

Footnote at Page 12 of Petition for Rehearing September 20, 1968

"The important and complex issues in this litigation have been determined by the entire court en banc. Six of the nine judges have cast their votes on the cold record and briefs, without oral argument. With great respect we suggest that issues as important as these should not be decided without the revealing interchange between court and counsel that usually accompanies oral argument. Indeed, there is substantial question whether the parties have in fact been "heard" as required by the statute (28 U.S.C. §46(c)). See the opinion of Jones, J. in Reynolds Aluminum Company v. NLRB, 394 F. 2d 405, 409 (5th Circuit 1968)."

241c
ADDENDUM 5

PX. 73

Handwritten draft release

BON AIR
MOTOR INN LIMITED — KIRKLAND LAKE, ONT.
MOTEL LTD. — TIMMINS, ONTARIO

To

Mr. Wardrope Release-4-15-64
11 PM

There have been rumors during the past few weeks about the exploration work of TGS North of Timmins, Ontario in Kidd Township. Until only ten days ago TGS had only one diamond drill operating, & there really was not much basis for the rumors. A second machine began operating on April 6, but only part time because extremely cold weather restricted the amount of water available for drilling. With the warmer weather of the past week, water was more easily found, so that a third drill was started on April 10, & a fourth on April 12. This intensification of work in the last few days has resulted in a rapid accumulation of significantly more data than the company had as recently as this past weekend.

There are still only six drill holes complete enough to be important in evaluating the sulphide body being explored, & actual assays from only one hole, but the information now in hand from this limited work gives the company confidence to allow me to announce that TGS has a mineable body of Zn, Cu, Ag ore of substantial dimensions that will be developed & brought to production as rapidly as possible.
(Emphasis Added)

ADDENDUM 6

Richard D. Mollison—for Plaintiff—Direct

(1000) Q. Mr. Mollison, turning now to the Canadian Minister of Mines and the circumstances under which he made a certain announcement with respect to the Kidd 55 discovery, what arrangements did you make with Mr. Wardrope, the Minister of Mines, in that connection? A. We met Mr. Wardrope and Mr. Douglas, Dr. Holyk and I, on the morning of April 15th at the Montreal airport and flew with them back to Toronto. On the way we discussed with them the progress of our work until that time. We showed them our sections, location maps, such assays as we had, in an effort to give them a fairly complete picture.

My recollection is that their response was complex, but perhaps in one way it was a welcome to us. They were happy that we had found something. They wanted to make some statement about it from the Department. This would be something that the Mines Minister would put out.

(1001) In response to that request I wrote out a brief statement which I handed to Mr. Wardrope.

His plans for that day were fairly busy. I don't recall the details, but the general situation was that he had a dinner and I think a speaking engagement that evening, but he expected to be—and just outside of Toronto somewhere. He expected to be back in Toronto that evening so that he could make an announcement, presumably, radio and T.V, or at least one of them, at 11 o'clock.

So I wrote out a statement and I marked it "For 11 o'clock" that night.

Q. Is this the statement that you wrote out, Mr. Mollison, Plaintiff's Exhibit 73 (handing)? A. This is similar to the one I wrote out. This is the first one I wrote out, and I made a couple of corrections and then I rewrote it without the corrections. Otherwise, as I recall, it is the same as this, and he took the other one with him.

ADDENDUM 7

David M. Crawford—for Plaintiff—Cross

Q. Tell us again what Dr. Fogarty said about this release, Mr. Crawford. Did he say when it was going to be delivered and by whom and where? (105) A. He told me

David M. Crawford—for Plaintiff—Cross

that the Minister of Mines, Mr. Wardrope, was going to make that announcement over TV and radio in Canada at 11 o'clock, New York time, that night.

Q. And he asked you to call the Texas Gulf managers in Canada to alert them to the making of this announcement at 11 p.m. on that evening? A. He did.

Q. And did you? A. I did. I called our manager of exploration in Calgary and read him the text of that release.

Q. The complete text of this release? A. I did.